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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 529.

LAURA H. JENNINGS, as Executrix of the Last Will and Testament of Frederic B. Jennings, Deceased,

Petitioner,

vs.

CHARLES W. ANDERSON, Individually and as United States Collector of Internal Revenue for the Third District of New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Involved	2
Statutes Involved	3
Statement	3
Specification of Errors to be Urged	5
Outline of Argument	6
I. While Section 611 relates to payments "made before or within one year after the enactment" of the Act, it is limited to payments made voluntarily by the taxpayer and does not apply to legalize enforced collections effected either before or after the Law	10
II. Section 611 applies only to administrative credits and refunds and was not intended to furnish a defense in suits at law against Collectors	16
III. In drafting Section 611 of the 1928 Act, Congress used the word "stayed" advisedly and in a sense different from "delayed"; further even though the word "stayed" be construed as meaning "delayed", the facts in the present case show that the claim in abatement did not cause the Collector to refrain from enforcing collection of the taxes in question	21
IV. If Section 611 was intended to bar actions in the Courts it is void as an attempt to take property without due process of law	23

PAGE

Blodgett *v.* Holden, 275 U. S. 142 27

Bowers *v.* New York & Albany Lighterage Co., 273 U. S. 346 ..... 4, 18

Brushaber *v.* Union Pacific Railroad Co., 240 U. S. 1 27

Campbell *v.* Holt, 115 U. S. 620 24

Adelaide F. Chapman *v.* U. S., 63 Ct. Cls. 424; 278 U. S. 660 ..... 19, 20

Coffey *v.* Exchange Bank, 296 Fed. 807 16

Danzer and Co. *v.* Gulf & Ship Island R. R. Co., 268 U. S. 633 24

Davis *v.* Mills, 194 U. S. 451 24

De Lima *v.* Bidwell, 182 U. S. 1 27

Ellay *v.* Bowers, 25 Fed. (2d) 637, Cert. Denied 48 S. Ct. 601 ..... 8, 19

Fox *v.* Edwards, 287 Fed. 669 16

Graham *v.* duPont, 262 U. S. 234 ..... 17, 22

The Harrisburg, 119 U. S. 199 24

Levy *v.* Wardell, 258 U. S. 542 24

Lincoln *v.* United States, 197 U. S. 419 27

Nichols *v.* Coolidge, 274 U. S. 531 27

Pigott v. Poe, 41 Fed. (2d) 273 22

Rafferty *v.* Smith, Bell & Co., 257 U. S. 226 26

Reeves *v.* Anderson, Pending Supreme Ct., Oct. Term, 1930, No. 463 2

Schlesinger *v.* Wisconsin, 270 U. S. 230 ..... 9, 27

Smietanka *v.* Indiana Steel Co., 257 U. S. 1 24

Stockdale *v.* Life Insurance Co., 87 U. S. (20 Wall.) 323 27

Toxaway Mills *v.* United States, 61 Ct. Cls. 363 ..... 17, 26

United States *v.* Burden, Smith & Company, 33 Fed. (2d) 229 22

United States *v.* Heinszen, 206 U. S. 370 26

Statutes Cited.

	PAGE
Judicial Code, Section 240 (a), as amended by Act of February 13, 1925 (43 Stat. 938)	2
Revenue Act of 1916, Section 14 (a); 39 Stat. 773	16
Revenue Act of 1918, Section 214 (a) 12 (a) 40 Stat. 1057	22
Revenue Act of 1918, Section 252; 40 Stat. 1057	16
Revenue Act of 1921, Section 252; 42 Stat. 227	16
Revenue Act of 1924, Section 287; 43 Stat. 339	16
Revenue Act of 1926, Section 284; 44 Stat. 9	16, 19
Revenue Act of 1926, Section 1106; 40 Stat. 9	7, 17, 25
Revenue Act of 1928, Section 607, 45 Stat. 791	3
Revenue Act of 1928, Section 611, 45 Stat. 791	3, 11, 21
Revenue Act of 1928, Section 612, 45 Stat. 791	3, 20
Revised Statutes, Section 3220	7, 21
Revised Statutes, Section 3224	19

Miscellaneous Authorities Cited.

House Report, p. 219, 70th Congress, 1st Session	12
House Report No. 356, p. 55, 69th Congress, 1st Session	18
Senate Report No. 960, p. 42, 70th Congress, 1st Session	12
Statement of Managers for the House, p. 23, Rep. No. 1882, 70th Congress, 1st Session	15

Treasury Regulations and Rulings Cited.

G. C. M. 4197, Cumulative Bulletin VII-2, p. 87	13
G. C. M. 6296, Cumulative Bulletin VIII-2, p. 152	28
Mimeograph 3660, Cumulative Bulletin VII-2, p. 82	13, 28
Regulations 45, Art. 1032	23

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BRIEF FOR PETITIONER.

Opinions Below.

The District Court for the Southern District of New York, without an opinion, directed a verdict in favor of the petitioner as plaintiff below (R. 15, 16). The case has not been reported officially.

The opinion *per curiam* (R. 28) of the Second Circuit (handed down July 21, 1930, but not yet officially reported) reversed the District Court and stated that the present

case "presents the same questions as those discussed in the opinion in *Reeves* v. *Anderson*, handed down herewith". The opinion in the *Reeves* case appears as a part of the record herein (R. 29-35). A Writ of Certiorari in that case (Oct. Term 1930, No. 463) has been granted and it has been advanced for argument herewith.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 28, 1930 (R. 28). Petition for Certiorari was filed October 27, 1930 (R. 36), and granted November 24, 1930 (R. 35). Jurisdiction is conferred upon this court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Involved.

The case involves the following questions:

(1) Is Section 611 of the Revenue Act of 1928 limited in its application to voluntary payments made by the taxpayer "before or within one year after the enactment" of the Act, or may it be extended with retroactive effect to legalize enforced collections made before the passage of the Law?

(2) Does Section 611, like Section 607 to which it is but an exception, relate merely to administrative refunds and credits of taxes in ordinary course under the provisions covering such administrative acts, or was it also intended to furnish a defense to suits against collectors?

(3) Do the facts in the present case support respondent's contention that the collection of the Federal income taxes in question was "stayed" by a claim in abatement within the meaning of Section 611?

(4) If Section 611 was intended to bar recoveries by suit in court in cases similar to the one at bar, does the Section violate the Fifth Amendment of the Constitution?

Statutes Involved.

Sections 607, 611 and 612 of the Revenue Act of 1928, c. 852, 45 Stat. 791, provide:

"SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax), assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Sec. 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

"SEC. 612. REPEAL OF SECTION 1106 (*a*) OF 1926 ACT. Section 1106 (*a*) of the Revenue Act of 1926 is repealed as of February 26, 1926."

Statement.

This case was tried before the District Court on a stipulation of facts (R. 18-21), together with Exhibits A to D,

inclusive, introduced by the respondent (defendant below) at the trial (R. 22, 23). The original action in the District Court was based on claims for refund of Federal income taxes for the years 1918 and 1919. Only the year 1918 is now involved, the cause of action involving the year 1919 having been dismissed by stipulation (R. 14).

The respondent concedes that at the time of the enforced collection of the taxes in question, on July 30, 1925, the five-year statute of limitations applicable thereto had expired and that but for the provisions of Section 611 of the Revenue Act of 1928, petitioner would be entitled to recover in this action. *Bowers* v. *New York and Albany Lighterage Company*, 273 U. S. 346, 47 S. Ct. 389. The issue is therefore confined to the interpretation of Section 611.

The pertinent facts in the case are as follows: Petitioner is the Executrix of the Last Will and Testament of Frederic B. Jennings, Deceased (R. 18).

Decedent duly filed his income tax return for the year 1918 on or before March 15, 1919, paying at that time the taxes due according to the return. Decedent died May 26, 1920 (R. 18).

On February 8, 1924, the Commissioner of Internal Revenue made an assessment of additional taxes against the estate of decedent (R. 18).

On February 25, 1924, petitioner filed a claim in abatement which claim was rejected on August 14, 1924. The reason given in the claim in abatement as the basis thereof was the erroneous inclusion of certain items in decedent's net income (R. 19, 22—Def. Ex. "B").

On July 1, 1925, respondent issued a Warrant of Distraint against the property of the decedent for collection of the said additional taxes and interest (R. 19).

On July 30, 1925 (more than five years after filing of

the said return by decedent and eleven and one-half months after the rejection of the claim in abatement) the respondent, notwithstanding petitioner's protests, enforced collection of the said additional tax and interest by duress and threat of distraint (R. 19).

On September 19, 1925, petitioner duly filed with respondent claim for refund of said additional tax and interest on the ground that the collection of said sum was barred by the Statute of Limitations (R. 19, 20).

On May 13, 1926, the claim for refund was rejected as to principal; the interest was subsequently refunded (R. 19).

This action was begun in the District Court on December 6, 1927 (R. 1).

The Revenue Act of 1928 was enacted and took effect on May 29, 1928.

On September 27, 1929, after trial, by stipulation, with a jury of one, the District Court directed a verdict in favor of the petitioner (R. 15). Judgment of the District Court was entered October 11, 1929 (R. 16). The judgment of the Circuit Court of Appeals for the Second Circuit reversing the District Court was entered on July 28, 1930 (R. 28).

Specification of Errors to be Urged.

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that Section 611 is to be applied to legalize collections effected by duress prior to the passage of the Revenue Act of 1928, and in not holding that the Section relates only to future administrative action on voluntary tax payments made before or within one year after the passage of the Law.

(2) In holding that Section 611 applies not only to purely administrative credits and refunds of the type mentioned in Section 607, but that it was also intended to furnish a defense in suits at law against Collectors.

(3) In holding that Section 611 of the Revenue Act of 1928 applies to the facts in this case, notwithstanding the absence of any proof that the claim in abatement was influential in staying the Collector from enforcing collection.

(4) In holding that Section 611 should be construed to revive a tax liability expressly discharged by law (in addition to being merely barred) and that, so interpreted, it does not violate the Fifth Amendment to the Constitution.

(5) In reversing the judgment of the District Court for the Southern District of New York.

Outline of Argument.

The respondent concedes that at the time of the enforced collection of the taxes in question, the statute of limitations applicable thereto had expired, *Bowers* v. *New York and Albany Lighterage Co.*, 273 U. S. 346, 47 S. Ct. 389, and that but for the provisions of Section 611 of the Revenue Act of 1928 the petitioner would have been entitled to recover in this action.

The general policy of protecting taxpayers from stale demands has been reflected in a long series of Revenue Acts, including the Revenue Act of 1928. Section 611 of the Revenue Act of 1928 created a limited exception to that policy. Said Section should not be interpreted to apply to the present case and to validate the prior illegal act of the Collector who violated the law in making a forcible collec-

tion where the taxpayer had done nothing but file a claim in abatement upon the invitation of the Government itself.

There are two general classes of payments of barred tax—those where on the demand of the Collector the taxpayer makes a voluntary payment and those where he pays only when forced to do so. Section 611 applies the same language to payments made before and after its enactment. The legislative history of the Section clearly shows that it does not validate or in any way apply to a payment which was enforced subsequent to its enactment. Since the Section uses the same language with respect to payments made before and after its enactment, it therefore follows that the Section does not apply to enforced payments made before its enactment.

The Section is also limited to administrative credits and refunds and was not intended to furnish a defense in suits at law against collectors. The making of credits and refunds is a purely administrative function of the Commissioner authorized by certain sections of each Act since the Revenue Act of 1916. Such Sections, however, were limited to cases where there were "overpayments" of taxes.

In an entirely different category were taxes illegally collected after the statutory period but not overpaid in the sense of never having been due. Refunds in such cases were authorized by Section 3220 of the Revised Statutes.

Section 607 of the 1928 Act to which Section 611 is but an exception was enacted to take the place of Section 1106 (a) of the Revenue Act of 1926. Section 1106 (a) of the 1926 Act which provided that the running of the statute of limitations should operate not only to bar the remedy but to extinguish liability, further provided "no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax". The prohibition on

claims and refunds in Section 1106 (a) has been interpreted as being limited to the administrative action of the Commissioner and did not apply to suits by the taxpayer. *Ellay* v. *Bowers*, 25 Fed. (2d) 637, Certiorari Denied, 48 S. Ct. 601.

In drafting Section 611 of the 1928 Act, Congress used the word "stayed" advisedly and in a sense different from "delayed". There were situations in which a stay in its legal sense would have resulted from the filing of a claim in abatement either with or without bond. The facts in the present case, however, indicate that there was no legal or moral obligation placed upon the Collector to refrain from collecting the tax.

Further, even assuming that the word "stayed" should be construed as "delayed", the facts in the present case show that the filing of the claim did not cause the Collector to delay in collecting the tax. The claim in abatement was filed on February 25, 1924, was rejected on August 14, 1924 and it was not until more than eleven and one-half months after the rejection of the claim that the tax was forcibly collected. The burden of proof was upon the respondent to show below that the filing of the claim in abatement had delayed collection. It was peculiarly within respondent's knowledge as to whether any acts took place in connection with the claim in abatement which caused the delay in collection. While respondent had full opportunity to introduce such facts in evidence he failed to do so and the record shows that there was merely a filing of a claim in abatement and a delay of more than eleven and one-half months in collection after its rejection.

If Section 611 was intended to bar actions in the courts, it is void as an attempt to take property without due process of law. Section 1106 (a) of the Revenue Act of 1926

was merely declaratory of the pre-existing law that the running of the statute of limitations extinguished the taxpayer's liability for the tax. Section 611, therefore, can only operate to impose for the first time a retroactive tax. While Congress may levy taxes retroactively, it may not levy such taxes upon a small group of citizens selected with no reasonable basis. If the Section is to be applied retroactively, it would levy for the first time a tax upon a small group of citizens who at the invitation of the Government had filed claims in abatement without imposing a similar liability upon other citizens whose taxes were delayed in collection due to the filing of waivers, claims for credit or because of innumerable other grounds. "A classification for the purposes of taxation must rest upon some reasonable distinction." *Schlesinger* v. *Wisconsin*, 270 U. S. 230. The selection of a group of taxpayers who had done nothing more than file claims in abatement would result in an arbitrary and unreasonable classification and would contravene the Fifth Amendment to the Constitution.

It is submitted that Section 611 does not apply as a defense to the case at bar and the judgment of the Circuit Court should be reversed.

ARGUMENT.

POINT I.

While Section 611 relates to payments "made before or within one year after the enactment" of the Act, it is limited to payments made voluntarily by the taxpayer and does not apply to legalize enforced collections effected either before or after the Law.

The general policy of protecting taxpayers from stale demands has been reflected in a long series of Revenue Acts, including the Revenue Act of 1928. Section 611 of the Revenue Act of 1928 created an exception to that policy. The effect of the Government's argument is that the exception goes even to the extent of providing that in cases where a collector had defied the limitations set on his conduct by law and had made collection by force from a taxpayer who insisted on his right to be free from such collection, the taxpayer was to be without any redress, provided he was one of those taxpayers who, in presenting his views to the Government, had chosen to file a certain kind of claim, which, at the time, he had full right to file. In other words, the Government claims that Congress intended to validate the action of the collector who violated the law in making a forcible collection, in cases where the taxpayer had done nothing but file a claim in abatement, a type of claim which was not only legal but was invited by the Government's own regulations. We submit that the words of the section do not indicate such an extreme intention.

There are two general classes of payments of barred tax—those where, on the demand of the collector, the taxpayer makes voluntary payment of the barred tax and those where he pays only when forced to do so. As will be

shown hereafter by legislative history and Bureau practice, as regards payments after the Act, the section takes away certain rights of the taxpayer if payment was voluntary, but not if the payment was an enforced one.

Therefore, it is our contention that since the same language in the section applies to payments before and after its enactment, the section has no application to enforced payments either before or after its enactment, but only to the voluntary payments so made. The Court below, however, held that in this case Section 611 applies, although payment was enforced.

Section 611, by its specific terms, relates to payments made *before* or within one year *after* the enactment of the law. The language used clearly indicates that payments falling into either classification shall be treated in precisely the same manner. Such payments, irrespective of whether they took place before or within one year after the law "shall not be considered as an overpayment under the provisions of 607".

As will be shown hereafter, the Section does not in any way authorize or validate a collection enforced *after* the enactment of the Law.

The basis of the foregoing contention as to payments after the section was enacted is as follows: Section 611 as originally introduced in the House Bill, December 6, 1927, not only placed a prohibition on refunds but authorized collection by distraint or suit if begun not later than a year after the law became effective. It read as follows:

> "SECTION 611. *Collection Stayed by Claim in Abatement.* If any Internal Revenue Tax (or any interest, penalty, additional amount or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if

a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then—

(a) the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection; and

(b) *a distraint or proceeding in court for the collection of such part may be begun within one year after the enactment of this Act.*" (H. R. 1, page 213, 70th Congress, 1st Session.) (Italics ours.)

The Finance Committee of the Senate struck out the entire section, Senator Smoot, Chairman, saying:

"Your Committee believes that the bar of the statute should be made effective as to both Government and the taxpayer and recommends that this section be eliminated." (Senate Report No. 960, page 42, 70th Congress, First Session.)

The Senate passed the Bill with Section 611 eliminated. It then went to conference and the Section was reincorporated in the Act, but the provision which authorized that "a distraint or proceeding in court for the collection of such part may be begun within one year after the enactment of this Act" was eliminated.

It is clear from the foregoing *résumé* of the history of the Bill that it was not intended to authorize the enforced collection of barred taxes subsequent to the enactment of the Revenue Act of 1928, even though a claim in abatement may have been filed and the filing of such claim may have

stayed collection. The Treasury Department has properly adopted this view in G. C. M. 4197, Internal Revenue Cumulative Bulletin VII-2, 87, where the General Counsel, referring to Section 611, stated as follows:

> "In order that proper action may now be taken in such cases, it is deemed advisable to render an opinion as to what extent, if any, the disposition of such cases is affected by the Revenue Act of 1928. * * * This Section of the Revenue Act of 1928 clearly has reference only to refund of taxes paid after the running of the statute of limitations where a claim in abatement has been filed, and as clearly it does not authorize the enforced collection of tax simply because a claim in abatement has been filed."

The present policy of the Treasury Department with respect to enforcing collections *after* the passage of the Act as further explained in Mimeograph 3660, Internal Revenue Cumulative Bulletin VII-2, p. 82. The Commissioner after stating that "Sections 607 and 611 *do not authorize* the Bureau to *enforce collection* of a tax *in any case after the expiration of the period of limitation,* but merely prescribe the effect of the period of limitation against the United States upon any assessment or payment made after the expiration of the period of limitation applicable thereto", directs that "inasmuch as many taxpayers will undoubtedly continue the practice heretofore followed of paying the amounts determined to be due notwithstanding the running of the statute of limitations, taxpayers offering to pay should be advised of their rights under the law and requested to execute waivers or enter into closing agreements." (Italics ours.)

To hold that a forced collection subsequent to May 29, 1928, is legalized by Section 611 would be to disregard the fact that the original House Bill specifically contained a provision which *would have* legalized such collection, but which after careful discussion and consideration on the part of both House and Senate was intentionally eliminated. There is no word or phrase in the statute, as it now reads, which would give justification to an interpretation which would authorize or validate a subsequent enforced collection.

If the word "payment" is interpreted as meaning "enforced collection" and if we accept, as we must, the conclusion that collections enforced subsequent to the passage of the Law are not affected in any manner by Section 611, we can hold that it does affect prior enforced collections only by saying that the Section provides exactly that which it does not, *i. e.*, that payments made before and after the enactment of the Law shall be placed in separate categories and that the Section does apply to prior payments but does not apply to subsequent payments. We cannot do this because we find that the language applies with like effect to situations arising before and after the enactment of the Law.

As has been indicated above, the Department has adopted the practice in cases arising after the passage of the Act of advising taxpayers of their rights and permitting them to make voluntary payments if they wish to do so. Having once made a voluntary payment, then the proper interpretation of Section 611 would prevent the Commissioner from making a refund thereof merely because the Statute of Limitations had run at the time when the payment was made. It was equitable and just that the

provisions should apply with similar effect to voluntary payments made prior to the passage of the Act, even though the Statute of Limitations may have run at the time when such payments were made. By limiting the Section, therefore, to voluntary payments, we find that its terms may be consistently complied with both as to prior and subsequent payments and its purposes carried out.

Much has been said in the various decisions of the lower courts with respect to the intention to be gathered from the legislative history of the Section. *It should be noted, however, that most of the statements referred to in those cases which hold in favor of the Government relate to comments or explanations made at a time when the bill included specific authorization for collection after the statute.*

The explanation of the Section given after the authorization for subsequent collection had been eliminated, is contained in the Report of the Managers for the House, wherein the following statement is made with respect to the elimination of the authorization for collection:

> "The Senate amendment struck out this section; and the House recedes with an amendment retaining the prohibition on refunds, as above described, and eliminating the authority for collection." (Statement of Managers for the House, page 23, Rep. No. 1882, 70th Congress, 1st Session.)

It is submitted that in its present form, as stated by the House manager, the Bill has the effect of "retaining the prohibition on refunds, as above described, and eliminating the authority for collection". This applies with equal effect to enforced collections made both subsequent and prior to the enactment of the Law.

POINT II.

Section 611 applies only to administrative credits and refunds and was not intended to furnish a defense in suits at law against Collectors.

As has been noted, Section 611 considered by itself has no meaning whatsoever. It merely declares what "shall not be considered an overpayment under Section 607". Section 607 provides that any tax assessed or paid after the expiration of the period of limitations properly applicable thereto "shall be considered an overpayment and shall be credited or refunded to the taxpayer" if claim therefor is duly filed. The making of credits and refunds is a purely administrative function of the Commissioner of Internal Revenue which has been authorized by each succeeding revenue law since the Revenue Act of 1916, but the sections authorizing such credits or refunds were limited to cases in which there were "overpayments" of taxes. (Act of 1916, Section 14 (a); 39 Stat. 773; Act of 1918, Section 252; 40 Stat. 1057; Act of 1921, Section 252; 42 Stat. 227; Act of 1924, Section 287; 43 Stat. 339; Act of 1926, Section 284; 44 Stat. 9.) These sections have been held to apply solely to administrative functions of the Commissioner. *Fox* v. *Edwards,* 287 Fed. 669, *Coffey* v. *Exchange Bank,* 296 Fed. 807.

In an entirely different category were taxes illegally collected after the statutory period therefor, but not overpaid in the sense of never having been due. In such cases Section 3220 of the Revised Statutes and the amendments thereto allowed the Commissioner to refund taxes "erroneously or illegally assessed or collected * * * taxes * * * in any manner wrongfully collected."

In 1923 the effect of the statute of limitations and the manner in which it affected the taxpayer's rights was brought before this Court in the case of *Graham* v. *duPont*, 262 U. S. 234, 258, in which case a taxpayer attempted to enjoin the collection of taxes which had been barred by the statute of limitations. It was held that no injunction would lie, but the Court stated:

> "It is certain that by the amendments to Section 252 and Section 3226, Revised Statutes, by the Act of March 4, 1923, c. 276, 42 Stat. 1504, the complainant is given the right now to pay the tax, and sue to recover it back, and in such a suit to raise * * * the bar of time against the assessment which he attempted to raise in the bill."

In spite of this dictum, the United States Court of Claims in December, 1925, in the case of *Toxaway Mills* v. *United States*, 61 Ct. Cls. 363, held that the proposition that a taxpayer might sue in court for the recovery of taxes collected after the statute of limitations could not be sustained "unless it be held that the limitation prescribed by the Act of 1921 operated not alone upon the remedy but also upon the right of the Government to collect and hold additional taxes after the end of the statutory limitation, even though such additional taxes were proper liabilities of plaintiff before that time." The Court held that the statute of limitations operated as a bar to the remedy but did not extinguish the right of the Government to collect the taxes and that the taxpayer was not entitled to a refund of the taxes which had been collected after the running of the statute of limitations. This decision of the Court of Claims resulted in the incorporation in the Revenue Act of 1926, 40 Stat. 9, of Section 1106, Subdivision (a), which provided:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

The purpose of this enactment was declared in Conference Report on the Revenue Bill of 1926 (House Report No. 356, p. 55, 69th Congress, First Session) to be as follows:

> "Amendment No. 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (Toxaway Mills *v.* U. S.), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court (See, TAFT, *C. J.*, in Graham *v.* duPont, 262 U. S. 234, 256, 258)."

Congress thus recognized that Section 1106 (a) was but declaratory of the existing law. In January, 1927 this Court held in the case of *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346, that a taxpayer from whom taxes have been collected after the expiration of the statute of limitations might recover in an action at law against a Collector, without requiring proof that the taxpayer had overpaid the tax in question. This decision caused the Solicitor General to confess error in the *Tox-*

away Mills case, *supra,* in which a writ of certiorari had been granted.

As has been noted above, Section 1106 (a) of the 1926 Act, while stating that the bar of the statute operated to extinguish liability, further provided "but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax." Some taxpayers were afraid that this provision would be construed (as has been Section 611 in the instant case by the Court below) as precluding a suit for recovery of taxes collected after the statutory period unless there had been an overpayment in the first instance. They, therefore, sought to establish that the prohibition against the enjoining of collection of Federal taxes contained in Section 3224, Revised Statutes, did not apply. The resulting suits clearly held that while Section 1106 (a) prohibited credits and refunds by the Commissioner of Internal Revenue, it had nothing to do with suits in the courts. *Ellay* v. *Bowers,* 25 Fed. (2d) 637, certiorari denied 48 S. Ct. 601. The Solicitor General in the case of *Adelaide F. Chapman* v. *United States,* 63 Ct. Cls. 424, acquiesced in this interpretation of 1106 (a) as follows:

> "Such a construction leads to results which Congress could never have intended. Its effect is to nullify the statute of limitations against the United States, because if the taxpayer may not enjoin the collection of a tax barred by the statute of limitations, as held in Graham *v.* duPont, *supra,* or prevent distraint proceedings by injunction and may be compelled by the collector to pay a tax the collection of which is barred by the statute of limitations, and then may not obtain a refund of the tax as one illegally collected unless the amount paid was more than justly due before the statute of limitations ran against the claim, it is clear that the statute of limitations becomes a dead letter."

Thereafter this Court, upon the motion of the Solicitor General, reversed the Court of Claims in the case of *Chapman* v. *United States, supra,* remanding the case with instructions to enter judgment for the taxpayer (278 U. S. 660).

At this stage was enacted the Revenue Act of 1928 which differed from preceding revenue laws in that it merely supplemented the Revenue Act of 1926, leaving operative all provisions of the earlier law, not specifically repealed or modified. Section 612 of the Act of 1928 provided that Section 1106 (a) of the prior Act was repealed as of February 26, 1926.

It is clear from what had theretofore transpired that Section 607, in declaring that payments of taxes after the statutory period therefor "shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim" was merely authorizing what Section 1106 (*a*) forbade, *i. e.,* administrative credits or refunds by the Commissioner where barred collections had been made, even though there was no true "overpayment" involved. This was the sole purpose of Section 607, which, like the Sections which preceded it relating to credits or refunds, had nothing to do with rights of action in the courts.

Section 611, which merely declares what "shall *not* be considered an overpayment under Section 607" was intended only to preserve (in the cases where collections had been stayed by abatement claims) the prohibition against administrative refunds, where the taxpayer had not overpaid the tax, which was formerly contained in Section 1106 (*a*) of the 1926 Act but was removed by Section 607, and, like Section 1106 (a), was not intended to have any effect upon rights of taxpayers to sue and recover in the courts.

It is submitted that the history of the legislation and decisions preceding the enactment of Section 611, clearly establishes: (1) that Section 611 is limited in its application to administrative refunds by the Commissioner, and (2) that Section 1106 (*a*) of the 1926 Act was merely declaratory of the pre-existing rule of law that the running of the Statute of Limitations in cases similar to the one at bar had the effect of extinguishing liability. This latter point becomes material when we come to consider the constitutionality of Section 611.

POINT III.

In drafting Section 611 of the 1928 Act, Congress used the word "stayed" advisedly and in a sense different from "delayed"; further, even though the word "stayed" be construed as meaning "delayed", the facts in the present case show that the claim in abatement did not cause the Collector to refrain from enforcing collection of the taxes in question.

In briefs already filed with this Court in other cases involving similar issues, convincing reasons have been set forth to show that the word "stayed" is not synonymous with the word "delayed," and that before Section 611 can apply it must be shown that the filing of the claim in abatement placed a legal or moral obligation upon the Collector to refrain from collecting the tax in question. (See *Amicus Curiae* Brief on Behalf of Petitioner in *Graham* v. *Goodcell*, No. 36, October Term, 1930, pp. 4-7; Petitioner's Brief, *Roy & Titcomb, Inc.* v. *U. S.*, No. 412, October Term, 1930, pp. 37-41). As has been pointed out in those

briefs, the taxpayer's contention with respect to the meaning of the word "stayed" has been accepted by the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *Burden, Smith & Company,* 33 Fed. (2d) 229, and in a number of well-reasoned District Court decisions.

The argument has been advanced on behalf of the Government that since under *Graham* v. *duPont,* 262 U. S. 234, the collection of a tax may not be enjoined, there is no way in which the tax may be stayed within the legal meaning of that word.

As an example of such a stay we direct attention to Section 214 (*a*) 12 (*a*) of the Revenue Act of 1918 which provides that in the case of a material reduction in the value of inventory a claim in abatement may be filed and "in such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim * * *." Where claims in abatement and bonds are filed in such cases, then a legal stay would clearly result, the words of the statute placing a legal obligation upon the Collector to refrain from collecting the tax until the claim has been decided.

An instance in which a legal stay without the filing of a bond resulted is found in the case of *Pigott* v. *Poe,* 41 Fed. (2d) 273, in which the collection was stayed by a deposit of money in escrow. It is clear, therefore, that even though an injunction may not be obtained against the collection of taxes in spite of the fact that the statute of limitations may have run, there are instances where a claim in abatement may be filed either with or without bond under such circumstances that a legal obligation or stay is placed upon the Collector which will prevent him from enforcing the

collection of the tax. In the present case there were no facts which imposed upon the Collector any such legal or moral obligation.

Even if we assume that the word "stayed" should be interpreted as synonymous with "delayed", the facts in the present case clearly show that the filing of the claim in abatement did not delay the collection. The abatement claim herein was filed on February 25, 1924. It was rejected on August 14, 1924, and it was not until eleven and one-half months after the rejection of the claim that the tax was collected by the respondent. While the case was tried on a stipulation of facts, the stipulation provided that additional evidence might be introduced at the time of the trial, and respondent did introduce such evidence (Respondent's Exhibits A to D, inclusive, R. 22, 23). It was peculiarly within respondent's knowledge as to whether any acts took place which would show that the collection of the tax was delayed by the filing of the claims. However, no such evidence was introduced. At any time subsequent to the filing of the claim, respondent might have collected the tax in question. (Regulations 45, Art. 1032.) That he merely failed to do so does not indicate in any way that the cause thereof was the filing of the claim in abatement.

POINT IV.

If Section 611 was intended to bar actions in the courts it is void as an attempt to take property without due process of law.

The protection afforded citizens by the Fifth Amendment to the Constitution, against Federal statutes which have the effect of taking property without due process of

law, includes protection against statutes which recreate, or revive liabilities which have become extinguished through lapse of time. *Danzer and Co.* v. *Gulf and Ship Island R. R. Co.*, 268 U. S. 633, 636. *Davis* v. *Mills*, 194 U. S. 451. *The Harrisburg*, 119 U. S. 199.

In these cases this Court distinguished the earlier case of *Campbell* v. *Holt*, 115 U. S. 620 (to the effect that limitations of the time for asserting common law liabilities might legally be changed or taken away altogether), saying that in *Campbell* v. *Holt* (involving a breach of common law liability on a contract) the limitation provisions applied "to the remedy only", but pointed out that other types of limitation may "operate as a limitation upon liability."

The proposition that the running of the statute extinguished the liability for the tax necessarily forms the basis for all decisions sustaining the right of citizens to sue collectors of internal revenue, and recover sums illegally exacted as taxes, after the statutory periods of collection has run.

There are no statutes which specifically authorize suits against collectors in cases of this kind. Such actions are brought as common law actions *in assumpsit*, for moneys had and received, and are personal to the collector, and not against his office. *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1; *Levy* v. *Wardell*, 258 U. S. 542.

Limitations which bar the remedy only are matters of defense, and do not form a basis for affirmative actions such as are here involved. The lower court decisions which have held that the Statute of Limitations in cases similar to the one at bar, does not extinguish liability but merely acts as a bar to the remedy, completely overlooked the fact that unless the Statute of Limitations in tax cases extinguishes liability, it can have no operative effect whatso-

ever. In the ordinary case where the Statute of Limitation is a bar to the remedy, the person against whom a claim is asserted may defeat the claim by pleading the Statute of Limitations in Court. However, because of the statutory prohibition against injunctions in tax cases and the authority given to collectors to collect taxes by distraint, a taxpayer may not avail himself of the Statute of Limitations as a bar to collection. He can do so, however, in an affirmative suit in court to recover taxes illegally collected from him. *Bowers* v. *New York and Albany Lighterage Co., supra.*

In the present case, the Statute of Limitations had expired when the collector enforced collection. The taxpayer nevertheless had no alternative but to pay the tax in question. It is obvious, therefore, from the facts in this case that if the Statute of Limitations served merely as a bar to the remedy, it would have been a complete nullity. The basis of petitioner's action in the lower court was the fact that the liability for the taxes in question did not exist at the time when the Collector enforced collection; consequently the act of the Collector was illegal, and the petitioner was invested with the right to recover—unless that right is cut off by Section 611. It is clear, therefore, that in cases similar to the one at bar, the running of the Statute of Limitations is not in any sense a bar to the remedy of the Government; it is equally clear that it does extinguish taxpayer's liability.

Congress has recognized this to be the effect of limitations on tax collections, for Section 1106 (*a*) of the Revenue Act of 1926 expressly provided that:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax

shall not only operate to bar the remedy but shall extinguish the liability * * *."

As has been shown elsewhere in this brief, this provision was intended merely to be declaratory of the law, as it had always been, and was enacted to offset a contrary holding by the Court of Claims in the case of the *Toxaway Mills* v. *United States, supra,* as was recognized by the Solicitor General in the case of *Chapman* v. *United States, supra.*

The lower courts which have construed Section 611 as operating merely to withdraw the defense of the Statute of Limitations, upon authority of the decision in *Campbell* v. *Holt, supra,* have wholly failed to show how a mere matter of defense can form the basis for an affirmative action *in assumpsit.* It seems to have been assumed in those cases that such actions against collectors are in themselves founded upon the limitations provisions of the revenue laws. Such is not the case, as these limitations refer solely to the administrative matter of collecting taxes and make no provisions for suits for recoveries of sums collected in violation of such provisions.

Section 611 was not intended as a ratification of illegal collections of taxes made after the statutory period therefor. This Court has sustained the power of Congress to ratify illegal acts of collectors of public revenues, and to to do so even though suits for the recoveries of moneys so illegally collected were pending at the time the ratifying statutes were passed. *United States* v. *Heinszen,* 206 U. S. 370. *Rafferty* v. *Smith, Bell and Company,* 257 U. S. 226. In these cases, however, there were involved statutes which expressly ratified the illegal collections and were susceptible of no other meaning. In the *Heinszen* case this

Court pointed out that, while Congress could ratify illegal collections, "it is not to be presumed to do so on language which, literally taken, has a narrower sense" citing its decisions against implied ratifications in *Lincoln* v. *United States,* 197 U. S. 419 and *De Lima* v. *Bidwell,* 182 U. S. 1.

The power to revive a tax, like the power to ratify, may be exercised only if the rights of private parties have not intervened. *Stockdale* v. *Life Insurance Company,* 87 U. S. (20 Wall.) 323. But, as has been recognized by this Court, citizens who have suffered wrongful exactions of money by collectors of internal revenue, acting without the scope of their office, do have rights enforcible against said collectors, as individuals. This bars a revival of the tax since such rights of action are property within the meaning of the Fourteenth and Fifth Amendments to the Constitution.

If Section 611 be a ratification or revival of barred taxes it is valid or invalid by the same tests which are applied to taxes when laid in the first instance. It is well settled that Congress for all its broad powers to lay taxes must act in that respect so as to produce results conformable to the purposes of taxation, and its enactments which go beyond this and are so arbitrary and discriminatory as to amount to confiscation will not be sustained. *Brushaber* v. *Union Pacific Railroad Company,* 240 U. S. 1; *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142. This is especially true as to the classification of the persons subject to the tax, as decided by this court in the case of *Schlesinger* v. *Wisconsin,* 270 U. S. 230, where it was said:

> "A classification for the purposes of taxation must rest upon some reasonable distinction."

It is possible that Congress, if it possessed the power to revive an extinguished tax, might do so as to all taxes laid and assessed, but not theretofore collected. In such cases it might be reasonable to retain all moneys illegally collected after the statutory period therefor and to require collection of all unpaid assessments. That is not the situation created under Section 611, as construed by the court below, or under any possible view of said section, as a ratifying statute. Nor does Section 611 even operate to remove the benefit of the statute of limitations from all who had by their own acts "stayed" collections of the tax. Instead, only one out of five types of cases where collections have been "stayed" is reached by the section.

(1) Section 611 does not authorize the retention of moneys illegally collected where collection was stayed by claims for credit (G. C. M. 6296—Internal Revenue Cumulative Bulletin VIII-2, p. 152).

(2) Section 611 does not authorize collections from those who stayed collections by abatement claims, but who had not been forced to pay prior to the enactment of the Revenue Act of 1928 (I. T. 3660—Internal Revenue Cumulative Bulletin VII-2, p. 82).

(3) Section 611 does not authorize collection or the retention of sums voluntarily paid after the statutory period for collection and more than one year after the Revenue Act of 1928 was passed, even though the collection was stayed by an abatement claim.

(4) Section 611 does not authorize collection to be made from those who stayed collection by claims in abatement, but who, prior to the Revenue Act of 1928, had recovered by administrative refunds, or suits in the courts, taxes illegally collected after the statutory period thereof.

If interpreted in the manner for which the Government contends, Section 611 would apply with retroactive effect to revive a previously extinguished liability as to a limited group of taxpayers; and the classification of the group upon which the burden would fall "rests upon no reasonable distinction". It is submitted that so interpreted, Section 611 would result in the taking of property without due process of law in violation of the Fifth Amendment of the Constitution.

We therefore contend that the judgment of the Circuit Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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